No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE AMERICAN INSTITUTE OF ARCHITECTS, THE AMERICAN TORT REFORM ASSOCIATION, THE COUNCIL OF COMMUNITY BLOOD CENTERS, GENERAL ELECTRIC COMPANY, THE MINNESOTA CIVIL JUSTICE COALITION, THE NATIONAL SCHOOL BOARDS ASSOCIATION, AND THE TEXAS CIVIL JUSTICE LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici curiae will address the following issue:

Whether the emergence, for the first time, of punitive damage awards that are excessive by the standards of contemporary society provides a substantial basis for this Court to scrutinize extreme punitive jury verdicts under the Due Process Clause of the Fourteenth Amendment.

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INTEREST OF THE *AMICI*

Amicus American Institute of Architects ("AIA") is a professional organization representing more than 56,000 architects in all 50 states. Through its 300 state and local chapters, the AIA strives to meet the needs and interest of the nation's architects and the public they serve by developing public awareness of the value of architecture and the importance of good design.

Amicus American Tort Reform Association ("ATRA"), formed in 1986, is a broad-based, bipartisan coalition of

approximately 400 nonprofits, professional societies, trade associations, large corporations and small businesses dedicated to bringing greater efficiency, fairness and predictability to the civil justice system.

Amicus Council of Community Blood Centers is an association of not-for-profit community-based blood centers which are responsible for over 25 percent of the nation's volunteer blood supply.

Amicus General Electric Company ("General Electric") is a diversified manufacturing, entertainment and financial services concern.

Amicus Minnesota Civil Justice Coalition ("MCJC") is comprised of business associations, professional groups, governmental associations and individual companies who believe that significant reform in the civil justice system is needed.

Amicus National School Boards Association ("NSBA") is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Amicus Texas Civil Justice League ("TCJL"), created in 1986, is a 2300 member organization of individuals, municipalities, associations and corporations in Texas who are concerned with the current state of the civil justice system.

It may not be self-evident what common reason these seven organizations have to file a brief in this case. But their shared interest arises from the fact that they have become in recent years acutely aware of the potentially catastrophic impact that the liability for punitive damages may have upon all potential tort defendants. The

three tort reform associations all were created within the last twelve years in response to widespread criticism of the civil justice system. Prior to that time, the tort system may have had flaws but they seemed manageable. That no longer is true and therefore organizations from all sectors of society have grown increasingly concerned about the impact of unrestricted jury awards.

For that reason AIA, the Council of Community Blood Centers, General Electric, MCJC, NSBA and TCJL, who together constitute a representative sample of ATRA's membership, have joined with ATRA in submitting a single brief. These organizations and their members now routinely face demands in civil litigation for multimillion dollar punitive damage awards, demands that simply were unheard of as recently as 20 years ago. *Amici* therefore wish to present their views to the Court concerning the dramatic changes that recently have occurred in the area of punitive damages. In particular, *amici* propose to demonstrate that changes in the law and practice of punitive damages now make constitutional scrutiny of punitive damage awards under the Fourteenth Amendment's Due Process Clause appropriate.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding whether and how to apply the Due Process Clause of the Fourteenth Amendment to an excessive and wholly arbitrary punitive damage award—as imposed upon petitioner by the jury in this case—one preliminary issue warrants extended consideration: Why should the Court now, for the first time in 200 years, scrutinize an award of punitive damages under the Due Process Clause of the Fourteenth Amendment? The answer is that the Court has not, until very recently, had occasion to consider whether punitive damage awards are subject to constitutional review. This is not because defendant's

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[1] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

attorneys lacked imagination; it is because, historically, such awards were not arbitrary or excessive. Only recently have punitive damages been awarded at a level and in such an arbitrary manner as to warrant this Court's attention—a level and manner that would have been unimaginable to courts a generation ago, much less to the framers of the Constitution.

Punitive damages are today awarded with a frequency and in amounts that are startling. In certain categories of civil litigation, a third or more of the plaintiffs who prevail receive punitive awards. And these awards may be enormous: punitive verdicts exceeding $1 million, while certainly not the norm, have become almost commonplace.

This system of punitive damages—where punitive awards are routine and fantastic verdicts receive little attention—is entirely a product of the last 20 years. For almost all of the nation's history, through the nineteenth and the first half of the twentieth centuries, punitive damages were largely reserved for the redress of torts that were viewed as especially offensive. When punitive damages were awarded, the amounts were quite small by present-day standards: the largest nineteenth century awards were worth approximately $50,000 to $60,000 in 1987 dollars. Such sums, while surely substantial, were neither noteworthy nor excessive in the terms of the day; they were, for example, in line with the civil and criminal fines imposed by nineteenth century legislatures for conduct similar to that giving rise to punitive verdicts.

Beginning about 1960, however, this regime of punitive damages underwent a dramatic transformation. The most comprehensive empirical study of punitive awards over time, conducted in San Francisco and Cook Counties by the RAND Institute for Civil Justice, found that the rate at which punitive damages were awarded increased in the two jurisdictions by almost 700% and almost

2000%, respectively, from the early 1960s to the early 1980s. The change in the size of punitive awards over the same period—viewed in constant dollars—was equally stunning. In San Francisco, the median punitive verdict increased by almost 400% and the average punitive award by more than 200%; in Cook County, the median punitive award increased by 4300% and the average by 10,000%. Indeed, in many jurisdictions the average punitive award now approaches or exceeds $1 million.

In reciting these statistics, we do not mean to overstate the perils of the punitive damage system. Punitive awards are still not routine (in the sense that they do not accompany a majority of plaintiffs' verdicts), and million dollar punitive damage judgments are returned in only a small fraction of cases. But *any* punitive awards in the million dollar range are an entirely new phenomenon. Even taking into account the effects of inflation, today's largest punitive damage judgments are an order of magnitude larger than the grandest awards of the last century; million dollar awards were literally unheard of even a generation ago. More broadly, it is only in the last 20 years that juries have started to render punitive verdicts that dramatically exceed the size of the fines that legislatures consider appropriate punishment for similar misconduct.

Viewed against this background—through the prism of history—it is clear that petitioner is not propounding a novel constitutional theory when it contends that the Fourteenth Amendment's guarantees apply to the award of punitive damages. To the contrary, petitioner seeks only to apply well-settled Fourteenth Amendment principles to a newly emerging problem: the award of punitive damages that are excessive by the standards of contemporary society and completely arbitrary.

ARGUMENT

THE APPLICATION OF CONSTITUTIONAL LIMITS TO PUNITIVE DAMAGES IS NOW APPROPRIATE BECAUSE THOSE DAMAGES ARE BEING AWARDED AT A FREQUENCY AND IN AMOUNTS THAT ARE ARBITRARY, UNPRECEDENTED AND, BY HISTORICAL STANDARDS, EXCESSIVE.

A. From The Eighteenth Through The Mid-Twentieth Centuries, Punitive Damages Were Awarded As Redress For Limited Categories Of Torts And In Limited Amounts.

1. *English Law.* The doctrine of punitive damages in its current form—the idea that juries may award damages in tort that exceed the plaintiffs' tangible injuries—was first recognized by English courts in 1763. In *Wilkes* v. *Wood*, 98 Eng. Rep. 489, 498-499 (C.P. 1763), one of a pair of cases decided that year invalidating searches and seizures under a general warrant, Chief Justice Pratt held that the jury could "give damages for more than the injury received." Suggesting that conduct "totally subversive of . . . liberty" may "aggravate damages" in an action against a Crown officer, the Chief Justice explained that damage awards in such cases may serve "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

Wilkes' companion case, *Huckle* v. *Money*, 95 Eng. Rep. 768 (C.P. 1763), also involved oppressive conduct by a government officer.[2] The court in *Huckle* was the

[2] The Chief Justice explained that the jurors "saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them. . . . To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." 95 Eng. Rep. at 769.

first to make use of the term "exemplary damages" in upholding an award that exceeded measurable harm to the plaintiff. See generally *Rookes* v. *Barnard*, 1 All E.R. 367, 407-08 (H.L. 1964) (Devlin); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 14 (1982).

These holdings were followed by decisions approving the award of punitive damages in a case of assault and battery where, although the injury was not severe, the plaintiff "ha[d] been used unlike a gentleman" (*Grey* v. *Jones*, 95 Eng. Rep. 794, 795 (C.P. 1764)); in an action where an officer ordered a common soldier whipped and the soldier, "though not much hurt indeed, was scandalized and disgraced by such a punishment" (*Benson* v. *Frederick*, 97 Eng. Rep. 1130 (K.B. 1766)); and in a suit for seduction of the plaintiff's daughter, which was deemed especially offensive because "the plaintiff . . . received this insult in his own house; where he had civilly received the defendant, and permitted him to make his addresses to his daughter" (*Tullidge* v. *Wade*, 95 Eng. Rep. 909 (C.P. 1769)).[3] Like the decisions involving invalid warrants, "all of these cases share one common attribute; they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, *supra*, 56 S. Cal. L .Rev. at 15. See K. Redden, *Punitive Damages*, § 2.2(A)(2) (1980).

[3] Several other decisions from the same period upheld awards of damages that were not directly tied to the plaintiffs' tangible losses, although the rulings did not explicitly refer to a doctrine of exemplary damages. See *Beardmore* v. *Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search); *Sharpe* v. *Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search); *Leith* v. *Pope*, 96 Eng. Rep. 777 (C.P. 1799) (malicious prosecution, an offense that was particularly serious because it involved an accusation of a capital crime); *Duberley* v. *Gunning*, 100 Eng. Rep. 1226 (K.B. 1792) (criminal conversion).

Against the background of these cases, the scholarly consensus is that common law courts developed the doctrine of punitive damages in an attempt to rationalize damage awards that exceeded the plaintiff's tangible injury during a period when judges had grave doubts about their authority to set aside jury verdicts. See Ellis, *supra*, 56 S. Cal. L. Rev. at 12, 14; Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 Minn. L. Rev. 207, 214 (1977).[4] At the same time, the award of punitive damages in cases of outrageous and insulting conduct allowed the jury to redress the plaintiff's humiliation and emotional distress in an era when those forms of injury generally were not compensable by the courts. Several of the early English cases, in fact, mingled the concepts of punishment and compensation, effectively concluding that the outrageous conduct of the defendant both necessitated and justified an "exemplary" award that would redress the plaintiff's intangible injuries. See K. Redden, *supra*, §§ 2.2(B) and 2.2(D); McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L.

[4] Through the end of the eighteenth century, judges remained extremely reluctant to set aside jury verdicts; they opined that it was appropriate only when the award was "monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush." *Beardmore* v. *Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). See *Sharpe* v. *Brice*, 96 Eng. Rep. 557 (C.P. 1774) ("in torts a greater latitude is allowed to the jury: and the damages must be expressed and outrageous to require or warrant a new trial"); *Leith* v. *Pope*, 96 Eng. Rep. 777, 778 (C.P. 1799) ("in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury" (footnote omitted)); *Duberley* v. *Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792) ("[w]e have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages").

Rev. 129, 132 (1930); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).[5]

This, then, was the understanding of the jury's power to award nominally punitive damages at the time of the drafting of the Constitution and the Fifth Amendment. While the notion of civil punishment for certain forms of misconduct can be traced at least to the Magna Carta, the express recognition of the jury's power to award punitive damages in tort to a plaintiff was, in the late eighteenth century, quite new. It was confined to cases involving a narrow range of outrageous and insulting behavior. And it was exercised, at least in part, for purposes that modern courts would view as compensatory.

2. *Early American Law.* a. The jury's power to award punitive damages in tort suits was vigorously debated by American courts and commentators throughout the nineteenth century, and that power was rejected or limited in a number of jurisdictions. See *Smith* v. *Wade*, 461 U.S. 30, 35, 37 n.5 (1983) (citing cases); *id.* at 58 & n.2, 59 (Rehnquist, J., dissenting). Compare T. Sedgwick, *A Treatise on the Measure of Damages* 45-46 n.t. (1847) and 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 349 (A. Sedgwick & J. Beale 9th rev. ed. 1912) (accepting doctrine) with 2 S. Greenleaf, *A Trea-*

[5] The courts explained that "[t]here is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal." *Beardmore* v. *Carrington*, 95 Eng. Rep. 790, 792 (C.P. 1764). In the latter class of torts, "where the damages depend upon mere sentiment and opinion, the Courts have no line to go by; and therefore it would be very dangerous for [judges] to interfere." *Duberley* v. *Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792). Indeed, Lord Devlin was of the view that, with the exception of cases involving oppressive government conduct, all of the early English decisions could be explained as instances of "aggravated damages"—that is, real but intangible damages. See *Rookes*, *supra*, 1 All E.R. at 412.

tise on the Law of Evidence § 253 (S. Croswell 14th rev. ed. 1883) (rejecting doctrine). See generally 1 T. Street, *The Foundations of Legal Liability* 478-82 (1906); G. Field, *A Treatise on the Law of Damages* 65-66 (1876). This Court, however, expressly recognized the propriety of punitive damage awards in 1852 (*Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 399 (1852) (dictum)); a majority of state courts, many of which addressed the question in the latter half of the nineteenth century, followed suit. See note, *supra*, 70 Harv. L. Rev. at 518 n.3.

This Court extensively canvassed a portion of this history in *Smith* v. *Wade*, *supra*, exploring the state of mind required in the late nineteenth century to support an award of punitive damages. See 461 U.S. at 38-46; *id.* at 68-84 (Rehnquist, J., dissenting). But regardless of how the requisite mental state was described at the time, it is plain that punitive awards typically were granted only in the case of torts that were deemed especially offensive or that placed life and limb in danger. "[A]s a *general rule*," this Court explained in 1876, "the plaintiff recovers merely" compensation for his injury. *Milwaukee & St. P. R.R.* v. *Arms*, 91 U.S. 489, 492 (1876) (emphasis in original). Accord *Missouri P. R.R.* v. *Humes*, 115 U.S. 512, 521 (1885). In contrast, until well into the twentieth century, punitive damages were available in the United States only in a "comparatively small class of torts" (T. Street, *supra*, at 479)—those involving what the earliest American decisions described as conduct "of the most atrocious and dishonorable nature." *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 91 (1791). See R. Bauer, *Essentials of the Law of Damages* § 47 (1919).

For the most part, these offenses were "dignitary torts," principally "the traditional intentional torts." *Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks of Prof. Ellis). They included assault and battery,[6] false

[6] See, *e.g.*, *Barlow* v. *Lowder*, 35 Ark. 492 (1880); *Ward* v. *Blackwood*, 41 Ark. 295 (1883); *Lyon* v. *Hancock*, 35 Cal. 372 (1868);

imprisonment,[7] libel and slander,[8] seduction,[9] conduct amounting to reckless endangerment,[10] and flagrant cases

Welch v. *Durand*, 36 Conn. 182 (1869); *Huber* v. *Tueber*, 10 D.C. (3 MacArth.) 484 (1877-79); *Green* v. *Southern Express Co.*, 41 Ga. 516 (1871); *Drohn* v. *Brewer*, 77 Ill. 280 (1875); *McIntyre* v. *Sholty*, 121 Ill. 660 (1887); *McNamara* v. *King*, 7 Ill. 432 (1845); *Nossaman* v. *Rickert*, 18 Ind. 350 (1862); *Taber* v. *Hutson*, 5 Ind. 322 (1854); *Southern Kan. Ry.* v. *Rice*, 38 Kan. 398 (1888); *Worford* v. *Isbel*, 4 Key. 247) (1808); *Pike* v. *Dilling*, 48 Me. 539 (1861); *Baltimore & O. R.R.* v. *Blocher*, 27 Md. 277 (1867); *Gaither* v. *Blowers*, 11 Md. 536 (1857); *Lucas* v. *Michigan Cent. R.R.*, 98 Mich. 1 (1893); *Corwin* v. *Watson*, 18 Mo. 71 (1853); *Goetz* v. *Ambs*, 27 Mo. 28 (1858); *Fay* v. *Parker*, 53 N.H. 342 (1872); *Pendleton* v. *Davis*, 46 N.C. (1 Jones) 98 (1853); *Roberts* v. *Mason*, 10 Ohio St. 277 (1859); *Porter* v. *Seiler*, 23 Pa. 424 (1854); *Earl* v. *Tupper*, 45 Vt. 275 (1873); *Hoadley* v. *Watson*, 45 Vt. 289 (1873); *Borland* v. *Barrett*, 76 Va. 128 (1882); *Barnes* v. *Martin*, 15 Wis. 240 (1862); *Bass* v. *Chicago & N.W. Ry.*, 39 Wis. 636 (1876); *Cracker* v. *Chicago & N.W. Ry.*, 36 Wis. 657 (1875).

[7] See, *e.g.*, *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101 (1893); *Green* v. *Southern Express Co.*, 41 Ga. 515 (1871); *Schlencker* v. *Risley*, 4 Ill. 483 (1842); *Taber* v. *Hutson*, 5 Ind. 322 (1854); *Wheeler & Wilson Mfg. Co.* v. *Boyce*, 36 Kan. 350 (1887); *Parsons* v. *Harper*, 57 Va. 64 (1860); *Hamlin* v. *Spaulding*, 27 Wis. 360 (1869).

[8] See, *e.g.*, *Louisville & N.R.R.* v. *Ballard*, 85 Ky. 307, 3 S.W. 530 (1887); *Sheik* v. *Hobson*, 64 Iowa 146 (1884); *Bodwell* v. *Osgood*, 20 Mass. (3 Pick.) 379 (1825); *Ellis* v. *Brockton Publishing Co.*, 198 Mass. 538 (1908); *Buckley* v. *Knapp*, 48 Mo. 152 (1871); *Vunck* v. *Hull*, 3 N.J.L. 814 (1809); *Cook* v. *Hill*, 5 N.Y. Sup. Ct. 341 (1849); *Gilreath* v. *Allen*, 32 N.C. (10 Ired.) 67 (1849); *Benaway* v. *Conyne*, 3 Pin. 196 (Wis. 1851).

[9] *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (1791); *McAulay* v. *Birkhead*, 35 N.C. (13 Ired.) 28 (1851).

[10] See, *e.g.*, *Linsley* v. *Bushnell*, 15 Conn. 225 (1842) (personal injury and property damage caused by overturned cart intentionally left on public highway); *Cameron* v. *Bryan*, 89 (Iowa) 214 (1893) (personal injury caused by attack by dog); *Whipple* v. *Wapole*, 10 N.H. 130 (1839) (property damage and personal injury caused by poorly maintained bridge); *Meibus* v. *Dodge*, 38 Wis. 300 (1875) (personal injury caused by attack by vicious dog); *Pickett* v. *Crook*, 20 Wis. 358 (1866) (personal injury caused by roaming ram).

was confined to the categories of tort described above. In particular, with the exception of actions for breach of contract to marry—suits that plainly have a strong dignitary component (see McCormick, *supra*, 8 N.C.L. Rev. at 137, 141)—punitive damages were emphatically not permitted in contract actions. See *id.* at 40.[14]

b. The most striking aspect of punitive damage awards during the first 150 years of the nation's history is their size: by modern standards, the awards were remarkably small. The largest punitive damage award that we uncovered in an extensive (although necessarily non-exhaustive) study of nineteenth century law—including punitive awards that were set aside as excessive—was $4,500.[15] This sum, worth approximately $58,000 in 1987 dollars, remains quite small by present-day standards when adjusted for inflation. (We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the ninteenth century figure into 1987 dollars). Most punitive awards, even those involving serious injuries, were much smaller.[16] Indeed, so far as

[14] The nineteenth century saw only one significant extension of liability for punitive damages beyond the field of intentional torts: such damages were allowed in actions alleging a breach of duty on the part of common carriers (particularly railroads) and public utilities. Decisions involving such liability, which Dean McCormick believed were related to the punitive damages action for oppressive conduct by public officers (see McCormick, *supra*, 8 N.C.L. Rev. at 138), often themselves involved insult or other aggravating circumstances. And they rested on the understanding that the defendants had assumed special obligations to the public, particularly concerning personal safety. See J. Deering, *The Law of Negligence* § 415 (1886); 2 S. Greenleaf, *supra*, at 263 n.a; T. Sedgwick (9th rev. ed. 1912), *supra*, at § 371a.

[15] *New Orleans, J. & Great N.R.R.* v. *Hurst*, 36 Miss. 660 (1859).

[16] Many of the reported decisions discussing punitive damages fail to disclose the punitive amounts that were either sought or awarded. It is likely, however, that the larger—and therefore more noteworthy—awards were specified. A listing of those cases noting damage amounts is contained in Appendix A.

we were able to determine, the largest nineteenth century award that *combined* punitive and compensatory damages was $20,000. Because that award (and others of similar magnitude) involved a serious injury,[17] the compensatory portion was presumably large.[18] Not only are the reported awards not excessive on their face, but the sums were in line with the contemporary fines set by statute for the type of conduct that gave rise to the punitive jury verdicts and therefore not arbitrary.[19]

Even these amounts overstate the damages that were awarded for what modern courts would regard as punitive purposes. During the first half of the nineteenth century, damages were generally unavailable as compensation for pain, humiliation and other forms of intangible injury, and consequential damages were restricted as well. See, *e.g.*, *T. Sedgwick*, *supra*, at 35-37 (1847). As in England, exemplary damages were used during this period to fill the gap. See K. Redden, *supra*, § 2.3(A); Note, *supra*, 70 Harv. L. Rev. at 519-20. Later in the century the difficulty of measuring the value of interests such as reputation led courts to label as "exemplary" many damage awards that now would be viewed as compensatory.[20] Courts also occasionally awarded nominally

[17] *Caldwell* v. *New Jersey Steamboat Co.*, 47 N.Y. 282-283 (1872) (award of $20,000 in combined compensatory and punitive damages to plaintiff passenger who was "maimed and crippled for life" by an exploding steamboat boiler).

[18] Many of the reported decisions identify only the combined total of punitive and compensatory damages. Even so, the numbers involved were notably small. See cases cited at Appendix A.

[19] See, *e.g.*, F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) (citing statutes) (fines for assault and battery ranging from $500-$3,000; fines for malicious mischief of up to $1,000; fines for seduction of up to $5,000); *New Orleans, J. & Great N.R.R.* v. *Allbritton*, 38 Miss. 242 (1859) (citing $10,000 statutory fine for reckless operation of a railroad).

[20] Thus, this Court explained at mid-century that "[i]n many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money stan-

punitive damages to cover the plaintiff's costs of litigation, although this Court in *Day* v. *Woodworth*, *supra*, disapproved such awards in the federal courts. See McCormick, *supra*, at 148 & n.108; *Linsley* v. *Bushnell*, 15 Conn. 225 (1842-43).

The size of punitive damage awards did not increase dramatically in the first half of this century. Writing in 1930, Dean McCormick noted what he described as several "startingly large verdicts of punitive damages"—one for $50,000, one for $33,333.33 (reduced to $10,000), and one for $12,650 (reduced by $5000).[21] While these sums certainly were significant amounts of money at the time—the largest was worth some $332,000 in 1987 dollars, an amount that includes compensatory damages for libel—they would startle no one today. Indeed, in 1955, at the dawn of the modern punitive damages era, an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980).

In sum, punitive damages played a relatively small role in this country's legal system through the first half

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dard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." *Day*, 54 U.S. (13 How.), at 399. See *Huber* v. *Teuber*, 10 D.C. (3 MacArth.) 484, 498 (1877-79) ("injury done may be aggravated by wanton violation of the rights of others, by malice, or revenge without cause, resulting in a species of injury whose effects can neither be calculated nor compensated"). See generally G. Field, *supra*, at §§ 73-75; 3 J.G. Sutherland, *A Treatise on the Law of Damages*, 726-35 (1883); 2 S. Greenleaf, *supra* at 256-57 n.2; T. Sedgwick, *supra*, at § 353 (9th rev. ed. 1912); T. Street, *supra*, at 480.

[21] McCormick, *supra*, 8 N.C.L. Rev. at 149 & n. 114, citing *Duncan* v. *Record Publishing Co.*, 145 S.C. 196, 143 S.E. 31 (1927); *Livesley* v. *Stock*, 281 Pac. 70 (Cal. 1929); *Seaman* v. *Dexter*, 96 Conn. 334, 114 A. 75 (1921).

of the twentieth century. Such damages were awarded in limited circumstances, in part for purposes of compensation, and in amounts that were not noteworthy by the standards of the time. During this period, as commentators have observed, "punitive damage awards proved exceptionally rare" (P. Huber, *supra* at 119) and, when awarded, were modest.

B. The Frequency And Size Of Punitive Damage Awards Have Exploded In Recent Years.

In the past, as we have shown, the award of punitive damages "merited scant attention. Punitive damages were rarely assessed and likely to be small in amount." Ellis, *supra*, 56 S. Cal. L. Rev. at 2. In the last 30 years, however, and particularly since 1970, that situation has changed dramatically. Punitive damages are now awarded with a frequency and in amounts that are without precedent. In part, this development is attributable to changes in the law that have made punitive damages available for the first time in several existing causes of action, and have given those damages a prominent role in new types of lawsuits. The increased availability of punitive damages also is undoubtedly rooted in shifting societal attitudes that have made juries ever more willing to assess ever larger punitive judgments. But whatever the underlying cause, the result has been the development of a regime of punitive damages that is entirely unlike the one that existed throughout almost all of the nation's history.

1. *Changes in Legal Doctrine.* The shifts in the law affecting punitive damages have not been sudden or dramatic. Since 1960, however, there has been an evolution in several areas that, in combination, has had significant consequences.

a. *Contract.* The black letter rule today, as it has been for 200 years, is that punitive damages are not available for breach of contract. See Restatement (Sec-

ond) of Contracts § 355 (1981). Beginning in the 1960s, however, many courts, led by those in California, have permitted the awarding of punitive damages for the bad faith breach of insurance contracts; punishment has been deemed appropriate for violation of the "covenant of good faith" that the courts have implied in such contracts. See, *e.g.*, *Gruenberg* v. *Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P.2d 1032, 1037 (1973). This bad faith action is now allowed "in a majority of jurisdictions." *Punitive Damages: A Constructive Examination*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation 5-2, 5-3 (1986) (herein cited as "ABA"). Indeed, "[i]nsurance bad faith litigation has become a field of its own, with numerous treatises and case law reporters." *Id.* at 5-4.

Punitive damage awards for breach of contract are not limited to the insurance area; "a significant minority of jurisdictions have extended the action to other kinds of contract cases." *Id.* at 5-4. Several jurisdictions, for example, have recognized a tort action—and therefore have found punitive damages available—for the breach of consumer contracts.[22] Other states have recognized at least the possibility that a covenant of good faith (for whose violation punitive damages may be awarded) is present in virtually all contracts.[23] See ABA 5-4, 5-5. Taken

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[22] See Comment, *Sailing the Uncharted Seas of Bad Faith: Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.*, 69 Minn. L. Rev. 1161 (1985); Note, *Contort: Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability*, 60 Notre Dame L. Rev. 510, 528 n.104 (1985).

[23] See, *e.g.*, *Commercial Cotton Co.* v. *United California Bank*, 163 Cal. App.3d 511, 209 Cal. Rptr. 551 (1985); *Nicholson* v. *United Pac. Ins. Co.*, 710 P.2d 1342 (Mont. 1985); *Forty Exchange Co.* v. *Cohen*, 125 Misc.2d 475, 479 N.Y.S.2d 628, 639-40 (N.Y. Civ. Ct. 1984); *EKE Builders, Inc.* v. *Quail Bluff Assocs.*, 714 P.2d 604 (Okla. Ct. App. 1985).

together, these developments have for the first time given punitive damages a significant role in the field of contracts.[24] Indeed, punitive damages have entered the world of contract with a vengeance: a Texas jury recently awarded $350 million in punitive damages in an action growing out of a breach of contract. See Foster Nat. Gas Rep. No. 1702 at 1 (Foster Assocs., Dec. 15, 1988).

b. *Product Liability.* Punitive damages also have entered the relatively new field of product liability. Commentators have noted that punitive awards seem anomalous in actions predicated on negligence or strict liability. See, *e.g.*, Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1140-43 (1984); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 24-28 (1982). Perhaps for that reason, as of 1976, punitive verdicts had been approved on appeal in only three product liability cases. See *id.* at 2-3 n.9, citing *Gilham* v. *Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), *Moore* v. *Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E. 103 (1970). Since then, however, courts have held punitive damages to be appropriate in the product liability area, and such awards have proliferated.[25]

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[24] See generally J. McCarthy, *Punitive Damages in Bad Faith Cases* (3d ed. 1983); Comment, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975); Comment, *Bad Faith Revisited: An Examination of Tort Law Remedies for Commercial Contract Disputes*, 34 Kan. L. Rev. 315 (1985).

[25] See, *e.g.*, *O'Gilvie* v. *Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Cessna Aircraft Co.* v. *Fidelity & Casualty Co.*, 616 F. Supp. 671

c. *Mass Torts.* Similarly, punitive damages have increasingly found their way into suits for so-called "mass torts." The first tort actions raising punitive damages issues involving a large group of plaintiffs were brought in 1961 to challenge the sale of an anti-cholesterol drug. See Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 51-52 (1983); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116 (1968). Commenting on the novel issues raised by this litigation, which eventually involved over 1500 suits (see Seltzer, *supra*, at 51-52), Judge Friendly warned: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Indeed, hundreds or thousands of punitive claims may grow out of a single design or manufacturing decision, essentially seeking to punish a defendant repeatedly for the same act. See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).[26] But the courts have never-

(D.N.J. 1985); *Stambaugh* v. *Int'l Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984); *Tetuan* v. *A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Hodder* v. *Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), 486 U.S. 1032, *cert. denied*, 109 S.Ct. 3265 (1989). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 268, 271 n.6 (1983); Owen, *supra*, 45 U. Chi. L. Rev. at 3 n.16.

[26] This concern is not hypothetical; two major corporations have been forced to seek the protections of bankruptcy because of the sheer number of punitive damage claims. See *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988), *cert. denied*, 110 S.Ct. 376 (1989).

theless failed to develop rules that would cabin the award of punitive damages in this sort of litigation, and accordingly the last 20 years have seen a dramatic growth of punitive claims in mass tort cases. See Seltzer, *supra*, at 39-40.

d. *Standard of Liability.* Commentators also have noted other, less tangible changes in the law of punitive damages, particularly in the sort of conduct that is thought to justify an award. Virtually all courts continue to insist that punitive awards are appropriate only in cases involving malicious, wanton or reckless conduct. But while "[t]he terminology hasn't changed . . . . we've played semantic games with the criteria, with the result that malice has been expanded well beyond the areas in which it commonly arises." *Symposium Discussion*, *supra*, 56 S. Cal. L. Rev. at 159 (remarks of Prof. Ellis). See *id.* at 160 (remarks of Prof. Wheeler); P. Huber, *supra*, at 128; DuBois, *Punitive Damages: Bonanza or Disaster?* 3 Litigation 35 (1976). *Cf. Smith*, 461 U.S. at 77 n.11 (Rehnquist, J., dissenting). The effects of all of these changes are outlined below.

2. *The Growth in Frequency and Size of Awards.* There can be no doubt that the past 20 years have seen an extraordinary change in the nature of punitive damages. Practitioners and commentators repeatedly note the "drastic," [27] "dramatic[]," [28] "mind-boggling," [29] "explosive" [30] increase in the frequency and severity of

[27] Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Calif. L. Rev. 1433, 1437 (1987).

[28] Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982).

[29] National Association of Independent Insurers, *Punitive Damages and the Civil Justice System* at 5 (1985).

[30] U.S. Tort Policy Working Group, *An Update on the Liability Crisis* (1987).

awards. "[E]normous" [31] and "astronomical" [32] verdicts are observed to be common in settings where, until recently, they would have been "unimaginable" [33] or "inconceivable" [34]; "[t]hey are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago." [35] Punitive damages are said in some cases to have gotten "out of hand"; [36] one influential commentator who wrote approvingly of punitive damage awards a decade ago has now expressed "concern . . . that large awards of this type are becoming common." [37] While demands for punitive damages "were extremely rare until the 1960's," [38] they now are described as "routine when the injury is serious and a wealthy institution is numbered among the accused," [39] and are said to "accompany a substantial part, if not the majority of the claims placed in litigation"; [40] indeed, it is now "an anomaly when one sees a complaint which does *not* seek punitive damages." [41]

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[31] DuBois, *supra*, 3 Litigation at 35.

[32] Sales & Cole, *supra*, 37 Vand. L. Rev. at 1154.

[33] Schulkin, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1797-1798 n.6 (1979).

[34] Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishments*, 1984 U. Ill. Rev. 153, 153.

[35] Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133 (1982).

[36] ABA 1-2.

[37] Owen, *supra*, 49 U. Chi. L. Rev. at 6.

[38] P. Huber, *supra*, at 127.

[39] *Id.*

[40] Morrison, *Punitive Damages and Why the Reinsurer Cares*, 20 The Forum 23 (1984).

[41] Levit, *supra*, at 259. See Jeffries, *supra*, 72 Va. L. Rev. at 143.

The courts themselves have noted the "present-day practice of seeking punitive damages in substantially *all* damages actions, and what will reasonably be termed the explosion of punitive damage awards." *Rosener* v. *Sears Roebuck & Co.*, 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237, 250 (1980) (Ellington, J., concurring) (emphasis in original), *app. dismissed*, 450 U.S. 1051 (1981). As one court concluded: "judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded." *Moore* v. *Remington Arms Co.*, 100 Ill. App. 3d 1102, 1104, 427 N.E.2d 608, 616-617 (1981).

This impressive body of anecdotal evidence of growth in the size and frequency of punitive awards is supported by the available empirical data. By far the most comprehensive empirical study was one conducted by the RAND Institute for Civil Justice. Peterson, Sharma & Shanley, *Punitive Damages—Empirical Findings* (RAND R-3311-1CJ 1987) (hereinafter cited as "RAND"). This study reviewed virtually all civil jury trials and verdicts in Cook County, Illinois, and San Francisco County, California, during the period 1960-1984, which it divided into three categories: busines tort and contract cases, intentional tort cases, and personal injury cases (including negligence and strict liability actions).[42] The study also reviewed all civil jury trials and verdicts in California for the period 1980-1984. In both of the metropolitan jurisdictions studied over time, the number and amount of awards (measured in constant dollars [43]) "increased substantially." RAND iii. Because the RAND data are the best available on the issue of how punitive damage awards have changed in modern times, they warrant an extended discussion.

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[42] See RAND 4 & n.3. The study considered only 25% of automobile and common carrier cases in Cook County.

[43] All of the dollar figures used in the RAND study are expressed in constant 1984 dollars.

a. *Frequency of Punitive Damage Awards.* The figures produced by the RAND report describing the increased frequency of punitive damage awards are striking. During the entire decade of the 1960s, punitive damages were awarded in only four business cases in Cook County for a total of $0.31 million, and in only eight such cases in San Francisco for a total of $0.4 million. For the five years from 1980 through 1984, in contrast, punitive damages were awarded in 23 business cases in Cook County for a total of $14 million, and in 34 cases in San Francisco for a total of $17 million. RAND 23-24. During the 1960-1964 period, punitive damages were awarded in two intentional tort cases in Cook County for a total of $0.01 million; in 1980-1984 they were awarded in 38 Cook County intentional tort cases for a total of $13 million. RAND 24-25.[44] In the personal injury area, there were no punitive damage awards in Cook County between 1960 and 1964, while all of the punitive awards from 1965-1980 totalled only $1.4 million; from 1980 to 1984 there were 14 punitive awards in such cases for a total of $27 million. RAND 21 table 2.9. Although the totals were smaller, the number of punitive damage awards in personal injury cases also increased in San Francisco; there were six such awards during 1980-1984, compared to one in each of the four preceding five-year periods. *Id.*

The RAND study makes clear that these increases are not a function of a simple growth in the number of suits being filed: the *rate* of awards is itself increasing dramatically. In Cook County from 1960-1964, punitive damages were awarded in only 0.2% of all cases in which compensatory relief was awarded; in 1980-1984, punitive

[44] The rate of punitive awards in intentional tort cases in San Francisco did not change, since "[p]rior to 1980 jurors in San Francisco imposed punitive damages in intentional tort cases far more frequently than did Cook County juries. The increased rate of punitive damages in Cook County during the 1980s merely brought that jurisdiction to the higher rate of San Francisco." RAND 11; see *id.* at 25.

damages were awarded in 3.9% of all suits in which there were compensatory awards—an increase of almost 2000%. The figures in San Francisco are equally dramatic. There, during 1960-1964, punitive damages were awarded in 2% of the actions in which there were compensatory awards; in 1980-1984, San Francisco plaintiffs received punitive damages in 13.6% of the actions in which plaintiffs prevailed—an increase of almost 700%. And the speed of increase is accelerating. The rate of punitive awards almost doubled in Cook County from the late 1970s to the early 1980s, and more than doubled in San Francisco. RAND 9 & table 2.1.

These figures demonstrate that awards of punitive damages, while certainly not the norm, are no longer reserved for exceptional cases. And looking at particular categories of suits yields even more striking results. In intentional tort cases that produced compensatory relief during 1980-1984, punitive damages were awarded 36% of the time in California and 33% of the time in Cook County. RAND 35 table 3.2. Almost 35% of the California defendants that were found liable for business torts or breach of contract were assessed punitive damages. RAND 35 table 3.2, 46 table 4.3. While punitive damages were awarded at much lower rates in personal injury cases—both in San Francisco and in Cook County during 1980-1984, they were assessed in one to three per cent of the cases in which jurors found liability (RAND 11 table 2.4)[45]—even in personal injury cases punitive liability frequency was increasing. RAND 12.[46]

[45] These findings are consistent with a study of reported decisions by Judge Posner and Professor Landes, which found that plaintiffs obtained punitive awards in a very small percentage of products liability cases. See Landes & Posner, *New Light on Punitive Damages*, Regulation, Sept.-Oct. 1986 at 33, 34-35, 36.

[46] Professor Priest, who also has reviewed civil verdicts in Cook County, reports that "[p]unitive damage awards have increased dramatically in recent years." He found that such damages "have been awarded in Cook County now in virtually all areas of civil

Other studies, while not conclusive, also point to a significant increase in the frequency of punitive damage awards. A search of Lexis computer files disclosed that the terms "punitive" and "exemplary" damages appeared in 0.007% of all civil cases in 1960 and 0.011% in 1970; the percentage reached 0.19% in 1980. Owen, 49 U. Chi. L. Rev. at 2 n.6. Similarly, as noted above, through 1976 there were only three reported decisions upholding punitive damage awards in product liability cases, all involving verdicts under $250,000; in contrast, in 1982 alone nine such awards were upheld, all exceeding $1 million. P. Huber, *supra*, at 127. See *Symposium Discussion*, *supra*, 56 S. Cal. L. Rev. at 160 (remarks of Prof. Wheeler).

Other data confirm the dramatic increase in punitive damage *claims*. Thus, prior to 1970, only one or two of the hundreds of product liability lawsuits filed against the Ford Motor Company each year sought punitive damages—a rate of less than .5%. By 1975, 5.4% of the suits against Ford sought punitive damages; by 1980, the percentage reached 27.1%. Owens, *supra*, 49 U. Chi. L. Rev. at 54 n.258. See P. Huber, *supra*, at 127.

b. *Size of Punitive Damage Awards.* Even more notable than the increase in the frequency of punitive damage awards has been what one survey termed "the extraordinary growth in the size of such awards." [47] Again, the RAND study provides the fullest available picture of this development. Measured in 1984 dollars, the median punitive damage award in Cook County in 1960-1964 was $1000 and the average $7000; in 1980-1984, the median

liability, from street hazard and road construction cases to product liability, malpractice, and landlord-tenant cases. Since the late 1960s, there has occurred a steady increase in the number of punitive damage judgments in business tort and—unusually enough—contract breach cases." Priest, *supra*, at 123.

[47] United States Tort Policy Working Group, *An Update on the Liability Crisis* 49 (1987).

had climbed to $43,000 and the average to $729,000—an increase of *4300%* and *10,000%*, respectively. The movement in San Francisco was similar: in 1960-1964 the median punitive damage award was $17,000 and the average $166,000; in 1980-1984 the median was $63,000 and the average $381,000. RAND 14-15. Indeed, in 1980-1984 the median punitive damage award for California as a whole was $78,000 and the average $743,000; the median for Los Angeles County was $100,000, and the average of the County's 149 punitive damage awards was $1.3 *million*. RAND 37 table 3.4.

Looking at particular categories of claims and types of defendants reveals plainly the magnitude of these awards. The median punitive damage award in California bad faith contract actions during 1980-1984 was $336,000 and the average $1.6 million. RAND vi-vii. Of the 38 punitive damage awards against businesses in Cook County from 1980 through 1984, the median award was $143,000 and the average $1.339 million; the median of the 321 punitive damage awards against businesses in California during that period was $100,000 and the average just under $1 million. RAND 51 table 4.7.

In reviewing these figures, it is the magnitude of the average award that is remarkable. Most punitive damage awards, of course, remain relatively modest, a fact that is reflected in the size of the median awards. See RAND 17. That being so, however, the average award may approach or exceed $1 million only if the largest awards are phenomenal in size. And that, in fact, appears to be the case.[48] The RAND study of Cook County, for exam-

[48] Of course, the amount awarded by the jury is not necessarily the amount received by the plaintiff; verdicts may be reduced in post-trial proceedings or through settlement. The RAND study, however, found that plaintiffs ultimately receive a large portion—something over 50%—of the punitive damages awarded by juries. RAND 26-30. See Shanley & Peterson, *Posttrial Adjustments to Jury Awards* (RAND R-3511-ICJ 1987) 32. Not surprisingly, the largest awards stand the greatest chance of being reduced by settlement or court action. RAND 26-30.

ple, found several extraordinarily large punitive personal injury awards during 1980-1984, which "were something new in personal injury trials . . . . In fact, each of the three largest awards was more than twice the $1.4 million total of the previous 20 years." RAND 22.

C. Punitive Damage Awards Are Subject To Review Under The Fourteenth Amendment And The Award In This Case Was Arbitrary And Excessive.

Viewed from the perspective of history, it is not surprising that a serious challenge under the Due Process Clause of the Fourteenth Amendment to a punitive damage award has only now made its way to the docket of this Court: it is only in recent years that punitive damage awards subject to challenge as unconstitutionally excessive and arbitrary have been imposed upon defendants. From 1789 until 1970, the limited availability and small magnitude of punitive damage awards gave no serious basis for anyone to claim protection under the Due Process Clause. In recent years, however, the need for constitutional scrutiny of punitive damage awards has become increasingly clear.

The development that has exposed punitive damage awards to scrutiny under the Due Process Clause is illustrated by the facts of this case, which involves a punitive award that is many times larger than the actual damages incurred [49] and is the product of the totally unfettered discretion of the jury. The trial court below imposed no limitation whatsoever on the severity of the punishment the jury could inflict and, as a result, the

[49] Although there was no differentiation between the punitive and compensatory elements of the damages awarded below, it is worth noting that the crux of the plaintiffs' complaint was the defendant's failure to pay a $2500 hospital bill incurred by plaintiff Haslip who, individually, was awarded a total of $1,040,000.

award bore no relationship to the harm inflected on the plaintiffs, or to the gain received by the defendants.[50]

In *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), Justice Brennan, joined by Justice Marshall, recently expressed the concern over the trend in which "punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Id.* at 2923 (Brennan, J., concurring). Such "unbridled discretion to impose punitive damages" simply cannot withstand due process scrutiny. See *id.* at 2924 (O'Connor, J., concurring).[51] Due process requires, at a minimum, procedural and substantive standards to guide juries in awarding punitive damages.[52] Vague and general instructions about the need to punish or deter do not provide the requisite degree of protection. To the contrary, they afford juries what amounts to "wholly standardless discretion to determine the severity of punishment." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring). The consequence of this approach has been to subject defendants in civil litigation to explosively large and frequent punitive damage awards. Because these awards have become completely subjective, arbitrary and excessive, they violate both the procedural and substantive components

[50] The trial court instructed the jury that if they found fraud they could "at [their] discretion award what is known as punitive damages." Petition for Certiorari at 8. If, in their "discretion," they decided to do so, the court instructed the jury simply to "take into consideration" the "character and degree of the wrong" and the "necessity of preventing similar wrongs." *Id.* at 9.

[51] Petitioner addresses the application of the Due Process Clause to punitive jury awards; repetition of those arguments here is therefore unnecessary.

[52] Legislatures could establish standards that define the specific circumstances under which punitive damages may be appropriate and impose limits or guidelines as to award amounts. In addition, a higher standard of proof, such as clear and convincing evidence, could be required to impose punitive damages.

of the Due Process Clause. Because the punitive award in this case violates these fundamental constitutional precepts of fairness, it should be set aside.

In saying this, we do not mean to suggest that many punitive damages awards—or, for that matter, that all of the largest awards—are constitutionally defective. But history teaches that acceptable punitive awards are those that bear some relationship to the offensiveness of the defendant's conduct. Those were the sorts of punitive damage verdicts that were familiar to the Framers of the Constitution, and that survived without constitutional challenge for the better part of two centuries. Awards such as the one here, which bear no relation to the defendant's wrong, should be subject to scrutiny under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Set out below (by state) is a comprehensive (although necessarily non-exhaustive) list of nineteenth century decisions that report the size of punitive (as well as combined punitive and compensatory) damage awards. We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the nineteenth century figures into 1987 dollars; in reporting the nineteenth century verdicts listed below, we give the real awards in parentheses, followed by their December 1987 values in brackets.

Punitive Component Specified:

Kansas:

Southern Kan. Ry. v. *Rice*, 38 Kan. 398 (1888) ($71.75—punitive; $35—costs & fees; $10—injury to feelings) [$918.67—punitive; $448.13—costs & fees; $128.04—injury to feelings].

Minnesota:

McCarthy v. *Niskern*, 22 Minn. 90 (1875) ($900) [$9,428.18].

Mississippi:

New Orleans, J. & Great N.R.R. v. *Hurst*, 36 Miss. 660 (1859) ($4,500) [$57,616.67].

New Orleans, J. & Great N.R.R. v. *Statham*, 42 Miss. 607 (1869) ($3,275) [$28,304.19].

New Hampshire:

Taylor v. *Grand Truck Ry. of Can.*, 48 N.H. 304 (1869) ($500—actual; $858.50—exemplary) [$4321.25—actual; $7,419.59—exemplary].

Woodman v. *Nottingham*, 49 N.H. 387 (1870) ($578—actual; $100—exemplary) [$5258.28—actual; $909.74—exemplary].

Fay v. *Parker*, 53 N.H. 342 (1872) ($150—actual; $331.67—exemplary) [$1,440.42—actual; $3,184.95—exemplary].

New Jersey:

Coryell v. *Colbaugh*, 1 N.J.L. 77 (1791) 75 pounds 35 s, 9 d.

North Carolina:

Pendleton v. *Davis*, 46 N.C. (1 Jones) 98 (1853) ($100—actual; $1000—exemplary) [$1,382.80—actual; $13,828.00—exemplary].

Pennsylvania:

Pittsburgh, C. & St. L. Ry v. *Lyon*, 123 Pa. 140 (1888) ($200) [$2,560.74].

Texas:

Neill v. *Newton*, 24 Tex. 202 (1859) ($100) [$1,280.37].

Dillon v. *Rogers*, 36 Tex. 152 (1871-72) ($100) [$960.28].

Bradshaw v. *Buchanan*, 50 Tex. 492 (1878) ($75) [$894.05].

Wisconsin:

Benaway v. *Conyne*, 3 Pin. 196 (Wis. 1851) ($400) [$5,531.20].

Hamlin v. *Spaulding*, 27 Wis. 360 (1870) ($100) [$909.75].

Compensatory & Punitive (where the components are not separated):

United States:

Lake Shore & Mich. S. Ry. v. *Prentice*, 147 U.S. 101 (1893) ($6,000) [$76,822.22].

Arkansas:

Clark v. *Bales*, 15 Ark. 452 (1855) ($100) [$1,234.64].

Barlow v. *Lowder*, 35 Ark. 492 (1880) ($180) [$2,145.72].

Kelly v. *McDonald*, 39 Ark. 387 (1882) ($117.53) [$1,401.04].

Ward v. *Blackwood*, 41 Ark. 295 (1883) ($2,000) [$24,692.86].

California:

Dorsey v. *Manlove*, 14 Cal. 553 (1860) ($2,000) [$25,607.41].

Nightingale v. *Scannell*, 18 Cal. 315 (1861) ($5,000) [$64,018.52].

Lyon v. *Hancock*, 35 Cal. 372 (1868) ($1,100) [$9,506.75].

Connecticut:

Edwards v. *Beach*, 3 Day 447 (Conn. 1809) ($50) [$367.77].

Dennison v. *Hyde*, 6 Conn. 508 (1827) ($1,200) [$12,201.18].

Linsley v. *Bushnell*, 15 Conn. 225 (1842) ($900) [$10,728.62].

Dibble v. *Morris*, 26 Conn. 416 (1857-58) ($225) [$2,777.95].

Welch v. *Durand*, 36 Conn. 182 (1869) ($200) [$1,728.50].

Dalton v. *Beers*, 38 Conn. 529 (1871) ($60) [$576.17].

District of Columbia:

Huber v. *Teuber*, 10 D.C. (3 MacArth.) 484 (1877-79) ($2,500) [$27,007.81].

Florida:

Florida Ry. & Navigation Co. v. *Webster*, 25 Fla. 394 (1889) ($9,000) [$115,233.33].

Georgia:

Green v. *Southern Express Co.*, 41 Ga. 516 (1871) (10,000) [$96,007.78].

Illinois:

Schlencker v. *Risley*, 4 Ill. 483 (1842) ($333) [$3,969.59].

Chicago W. Div. Ry. v. *Hughes*, 87 Ill. 94 (1877) ($4,500) [$48,614.06].

McIntyre v. *Sholty*, 121 Ill. 660 (1887) $2,500) [$32,009.26].

Indiana:

Taber v. *Hutson*, 5 Ind. 322 (1854) ($600) [$7,682.22].

Nossaman v. *Rickert*, 18 Ind. 350 (1862) ($250) [$2,880.83].

Humphries v. *Johnson*, 20 Ind. 190 (1863) ($200) [$1,868.65].

Iowa:

Frink & Co. v. *Coe*, 4 Greene 555 (Iowa 1954) ($270) [$3,457.00].

Brown v. *Allen*, 35 Iowa 306 (1872) ($3,600) [$34,570.00].

Milwaukee & St. P. R.R. v. *Arms*, 91 U.S. 489 (1875) (from Iowa Circuits) ($4,000) [$41,903.03].

Cameron v. *Bryan*, 89 Iowa 214 (1893) ($1,500) [$19,205.56].

Kansas:

Sawyer v. *Sauer*, 10 Kan. 351 (1872) ($3,500) [$33,609.72].

Wheeler & Wilson Mfg. Co. v. *Boyce*, 36 Kan. 350 (1887) ($1,000) [$12,803.70].

Kentucky:

Worford v. *Isbel*, 4 Ky. 247 (1808) ($397.50) [$2,862.83].

Maysville & L.R.R. v. *Herrick*, 76 Ky. 122 (1877) ($5,200) [$56,176.25].

Louisville & N.R.R. v. *Ballard*, 85 Ky. 307, 3 S.W. 530 (1887) ($3,000) [$38,411.11].

Maine:

Pike v. *Dilling*, 48 Me. 539 (1861) ($151.25) [$1,936.56].

Goddard v. *Grand Truck Ry. of Can.*, 57 Me. 202 (1869) ($4,850) [$41,916.13].

Wilkinson v. *Drew*, 75 Me. 360 (1883) ($170.83) [$2,109.14].

Maryland:

Mulatto Joan v. *Joshua Shield's Lessee*, III Early Maryland Reports 7 (1790) (125 pounds).

Gaither v. *Blowers*, 11 Md. 536 (1857) ($1,750) [$21,606.25].

Schindel v. *Schindel*, 12 Md. 108 (1858) ($629.50) [$8,369.93].

Massachusetts:

Bodwell v. *Asgood*, 20 Mass. (3 Pick.) 379 (1825) ($1,400) [$14,234.71].

Austin v. *Wilson*, 4 Cush. 273 (Mass. 1849) ($30) [$414.84].

Ellis v. *Brockton Publishing Co.*, 198 Mass. 538 (1908) ($154) [$1,971.77].

Michigan:

Lucas v. *Michigan Cent. R.R.*, 98 Mich. 1 (1893) ($1,200) [$15,364.44].

Minnesota:

Lynd v. *Picket*, 7 Minn. 184 (1862) ($439.59) [$5,065.54].

Mississippi:

New Orleans, J. & Great N.R.R. v. *Allbritton*, 38 Miss. 242 (1859) ($10,000) [$128,037.04].

Whitfield v. *Whitfield*, 40 Miss. 352 (1866) ($6,925) [$54,408.47].

Memphis & C. R.R. v. *Whitfield*, 44 Miss. 466 (1870) $4,500) [$40,938.16].

Missouri:

Goetz v. *Ambs*, 27 Mo. 28 (1858) ($3,000) [$39,888.46].

Kennedy v. *North Mo. R.R.*, 36 Mo. 351 (1865) ($2,000) [$15,030.43].

Buckley v. *Knapp*, 48 Mo. 152 (1871) ($5,000) [$48,013.89].

New Jersey

Vunck v. *Hull*, 3 N.J.L. 814 (1809) ($400) [$2,942.13].

Berry v. *Vreeland*, 21 N.J.L. 183 (1 Zabriskie) (1874) $300) [$3,703.93].

New York:

Cook v. *Hill*, 5 N.Y. Sup. Ct. 341 (1849) ($600) [$8,296.80].

Ohio:

Roberts v. *Mason*, 10 Ohio St. 277 (1859) ($700) [$8,962.59].

Pennsylvania:

Roberts v. *Swift*, 1 Yeates 209 (Pa. 1793) (720 pounds).

Dennis v. *Barber*, 6 Serg. & Rawle 420 (Pa. 1821) ($500) [$4,321.25].

Porter v. *Seiler*, 23 Penn. 424 (1854) ($2,000) [$25,607.41].

Texas:

Brooke v. *Clark*, 57 Tex. 105 (1882) ($5,500) [$65,563.79].

Vermont:

Hoadley v. *Watson*, 45 Vt. 289 (1873) ($200) [$1,920.56].

Virginia:

Parsons v. *Harper*, 16 Gratt 64 (Va. 1860) ($1,000) [$12,803.70].

Borland v. *Barrett*, 76 Va. 128 (1882) ($1,000) [$11,920.69].

Wisconsin:

Barnes v. *Martin*, 15 Wis. 240 (1862) ($2,000) [$23,046.67].

Pickett v. *Crook*, 20 Wis. 358 (1866) ($100) [$785.68].

Cracker v. *Chicago & N.W. Ry.*, 36 Wis. 657 (1875) ($1,000) [$10,475.76].

Meibus v. *Dodge*, 38 Wis. 300 (1875) ($250) [$2,618.94].

Bass v. *Chicago & N.W. Ry.*, 39 Wis. 636 (1876) ($4,500) [$48,614.06].